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Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

RE: Disclosure of Payments by Resource Extraction Issuers, File No. S74210

Dear Secretary Murphy,

I respectfully write to provide a comment for the on-going rule-making process that the Securities Exchange Commission is undertaking for Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.¹

I appreciate the opportunity to comment on such an important piece of legislation. I would like to provide input about some of the issues surrounding foreign laws and breach of contract. I am a lawyer by training, and have worked in the area of extractive industries contracts and legal frameworks², particularly on the subject of defining and understanding confidential information in this area. I am currently a post-doctoral research fellow at the Vale Columbia Center on Sustainable International Investment, a joint Center of the Earth Institute at Columbia University and Columbia Law School.

Much of the research done on confidentiality issues in extractive industry contracts and laws was published in *Contracts Confidential: Ending Secret Deals in the Extractive Industries* ("*Contracts Confidential*").³ As a lawyer, academic, and co-author of that report, I would like to comment on how that research affects questions before the Commission.

Contracts Confidential investigated the text of 150 extractive industry contracts from around the world. The confidentiality clauses of these agreements were included in the report as Appendix B.⁴ During the research phase of the report, the Columbia team also compiled a global survey of foreign mining and hydrocarbons laws' confidentiality and disclosure provisions. Our database includes well over 100 provisions from foreign and US laws and regulations concerning confidentiality and required and prohibited disclosures.

¹ Full cite is 15 USC 78(q)(1)(C).

² This document uses (1) extractive industry legal frameworks, (2) oil, gas, and mining laws, and (3) minerals and hydrocarbons laws interchangeably.

³ This report with appendices has been submitted to the Commission and it is available at <http://www.revenuewatch.org/files/RWI-Contracts-Confidential.pdf>

⁴ See Id.

The research conducted for *Contracts Confidential* by myself and Peter Rosenblum,⁵ with research assistance provided by Columbia law students, concludes that confidentiality provisions of foreign laws on oil, gas, and mining extraction, refer to the confidentiality of geologic information, operational processes, trade secrets, personal information, and proprietary information. Our global survey of these laws did not uncover any examples of an explicit prohibition of disclosure of payments or provisions making payments confidential. Payments would not generally fall under the categories of information that is typically protected. In fact, some foreign laws require payment disclosures.

The Commission is considering an exception to mandatory disclosure in the event there is a foreign law prohibiting such disclosures. Creating this exception would only provide an incentive for countries to write laws intended to subvert 1504's requirements, thereby undermining the provision's effect. Furthermore, companies exert significant influence in contract negotiations and the drafting of laws; countries may be pressured to include such clauses in their laws and contracts. There are not currently laws explicitly prohibiting payment disclosure, making this an unnecessary and dangerous exception.

Similarly, contracts will not be breached if 1504 is fully implemented as Congress intended. Our survey of extractive industry contracts between governments and oil, gas, and mining companies shows that a majority explicitly allow for disclosures if mandated by a securities regulator. Sixty (60) of the 150 contracts surveyed in *Contracts Confidential* explicitly cite stock exchanges as a valid exception to confidentiality. Even more allow for disclosures required under any law or regulation, foreign or otherwise. The only contracts that did not include such provisions were for highly sensitive materials like Uranium. More information on foreign laws and contracts is provided in Section One, below.

This research provides answers to the Commission's questions in Section II.D.5 "Other Matters." In short, there is no need for a confidentiality exception for foreign laws as there is in the Modernization of Oil and Gas Reporting regulations;⁶ reserves are regularly (though not universally) cited as needing confidential protection in law. Payments are not. There is no basis for the comparison. Further, there is no need for exceptions for contract provisions.

1) 1504 Will Not Result in Listed Companies Violating Contracts or Foreign Law

1.1 Foreign Law

Our review of various confidentiality provisions and positive and prohibitive disclosure provisions in foreign laws governing mineral and hydrocarbons extraction from around the world has found no explicit prohibition of payment disclosure as contemplated by 1504.

⁵ Lieff, Cabraser, Heimann & Bernstein Clinical Professor in Human Rights at Columbia Law School.

⁶ Modernization of Oil and Gas Reporting, Securities Act Release No. 8995, Exchange Act Release No. 59,192, 74 Fed. Reg. 2158 at 2187 (January 14, 2009).

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Law students at Columbia Law School created a database of confidentiality clauses and other clauses in oil, gas, and mining laws and regulations from as many countries as could be found from public sources as well as pay-for-access resources. The research conclusions were included in *Contracts Confidential*, but the provisions from these laws have not been peer-reviewed and published; but, they are instructive as to global foreign law on confidential information in the extractive industries.

The dilemma posed by some commentators—that companies complying with 1504 would be violating foreign law—is not consistent with the actual text of oil, gas, and mining laws. Information protected by confidentiality usually pertains to geology, operational processes, trade secrets, personal information of employees, and proprietary information. National security is also cited in some laws.

This survey reveals no examples of an explicit prohibition of disclosure of payments or provisions providing payments with confidentiality. Payments would not generally fall under the categories of information that is protected, though could arguably be “proprietary information” of companies. Some laws are sufficiently vague that they could be construed to do so. However, any ambiguity about the content of these prohibited disclosures, where such ambiguity exists, errs in favor of companies, which could then validly argue that payments are not explicitly prohibited. If companies choose to list, they are revealing otherwise arguably proprietary information, including various types of payments (exclusivity payments, executive compensation, for example) and other financial information. If governments are opposed to the disclosure of payment information, they have not specifically prohibited it by law or regulation; they have, however, explicitly prohibited disclosure of other categories of information.

Many of the confidentiality provisions in these minerals and hydrocarbons laws allow for disclosure of geological and other statistical information to be published in summary form and for disclosures needed for the protection of health, safety, public welfare, and the environment. To give the Commission an idea of the actual text of these foreign laws, examples of various provisions are included as an Annex to this submission. These laws are public, however, so only a few examples are provided. Unlike contracts, finding the relevant text is not a difficult task, though it can be time consuming.

In contrast, there are examples of countries explicitly requiring the disclosure of payments (also referred to as economic benefits) as contemplated by 1504, such as that found in the Minerals Law of Afghanistan, 2005:⁷

The Ministry of Mines and Industries shall collect, not less than annually, and publish reports concerning State revenues and other direct or indirect economic benefits received by the State from Mineral Activities in accordance with internationally accepted norms respecting transparency in the extractive industries. The Ministry of Mines and Industries shall be authorized to, for the purposes of preparing such reports, require Holders of Mineral Rights and all State or public agencies and public officers to, not less than annually, submit data, including production,

⁷ Minerals Law of Afghanistan, Article 100(3), “Obligation of Transparency.” Available at http://www.bgs.ac.uk/afghanminerals/docs/Minerals_law.pdf.

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financial data, and other direct or indirect economic benefits received by them and all amounts paid by them in connection with Mineral Activities.

In the hydrocarbons industry, the Commission may note that São Tomé e Príncipe has an even broader disclosure of payments requirement, including payments not just from companies, but also the governments' own payments to and expenditures from its oil savings fund.⁸

When confidentiality provisions are present, the provision from Afghanistan's 2005 Minerals Law appears to be fairly standard:⁹

- (1) Applicants for Mineral Rights and Holders thereof may request the confidential treatment of technical, geological and mining information submitted to the Ministry of Mines and Industries. Such information may be treated as confidential by the Ministry of Mines and Industries until expiration or termination of the relevant Mineral Right. After this period, such information may be made available to the public.
- (2) Prior to the expiry of the period of confidential treatment, such information may be used by the Ministry of Mines and Industries for purposes of compiling public records, data and statistics, which may be published without disclosing the confidential parts of the information.¹⁰

Geological and technical information is the primary focus of confidentiality. This is true for most provisions we have seen. For another example, see the very detailed provision from Canada's Drilling and Production Regulation, which has numerous provisions detailing confidential geological information (in the Annex).

Our review of numerous foreign oil, gas, and mining laws shows that there not provisions prohibiting 1504 payment disclosure. An exception is, therefore, unnecessary. Granted, there are many countries with many laws that could touch on the issue, and I have not seen every single one. The Commission may want to see the actual text of any country's laws or regulations that is said to prohibit payment disclosure. These laws are public, so they should be provided to the Commission.

In sum, there is no need for an exception for foreign law, as there is for reserves; the comparison of payments to reserves is inappropriate, unnecessary, and could create a flurry of new legislation specifically designed to undermine 1504.

1.2 Contracts with Foreign Governments

The survey of 150 extractive industry contracts with foreign governments also comes to a different conclusion than other submissions to the Commission. Many of these contracts explicitly cite securities exchange disclosures as an exception to confidentiality. Sixty (60) of

⁸ See Annex.

⁹ Minerals Law of Afghanistan, Article 103(3). Available at http://www.bgs.ac.uk/afghanminerals/docs/Minerals_law.pdf.

¹⁰ Minerals Law of Afghanistan, Article 103. Available at http://www.bgs.ac.uk/afghanminerals/docs/Minerals_law.pdf.

the 150 contracts surveyed for *Contract Confidential* included such terms. Even more make a general reference to exceptions for foreign law, home country laws and regulations, and disclosures required by any competent legal authority over the parties. My experience with many other contracts in addition to those surveyed demonstrates such principles to be in a large majority of these contracts.

What is clear, though, is that no contract or foreign law reviewed in my research— and these number in the hundreds in both categories— explicitly prohibits the disclosure of payment information by companies, as 1504 requires. Indeed, some laws explicitly require disclosures like 1504.

2) Questions in II.D. 5 “Other Matters”

In addition to the general discussion of foreign law and contract prohibitions, I would like to briefly respond specifically to the Commission’s questions on confidentiality in II.D. 5 “Other Matters.”

Question 54

Would the disclosure requirement in 13(q) and the proposed rules potentially cause a resource extraction issuer to violate any host country’s laws?

No. Our research has not found an explicit prohibition of payment disclosure in oil, gas, and mining laws from around the world. While some laws are sufficiently vague that they could be construed to do so, they could also arguably not cover payments, providing companies with a valid legal argument that they are not breaking foreign law by complying with US law. In fact, there are examples of explicit mandatory disclosures of payments, as 1504 would require, not vice versa.

Are there laws that currently prohibit such disclosure?

Research shows that there is no explicit prohibition of payment disclosure in oil, gas, and mining laws and regulations and other fiscal laws that could also touch the issue. The Commission may want to see the actual text of any country’s laws or regulations that is said to prohibit payment disclosure. These laws are public, so they should be provided to the Commission.

Would the answer depend on the type of payment or the level of aggregation of the payment information required to be disclosed?

No, see above. There is no mention of payments, so level of aggregation would not make a difference.

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If there are laws that currently prohibit the type of disclosure required by Section 13(q) and the proposed rules, please identify the specific law and the corresponding country?

None identified; only laws *requiring* payment disclosure in countries such as Afghanistan and São Tomé e Príncipe. (See above again).

Question 55

Should the Commission include an exception to the requirement to disclose the payment information if the laws of a host country prohibit the resource extraction issuer from disclosing the information?

No, there is no legal need to do so.

Would such an exception be consistent with the statutory provision and the protection of investors?

No. It would be an unnecessary exception, and would work to undermine the statute, which would not be consistent with its effective application. Investors would likely be better protected with uniform rules applied as intended by the law.

If we provide such an exception, should it be similar to the exception provided in Instruction 4 to Item 1202 of Regulation S-K?

There should be no exception because there is no need for one.

Should we require the registrant to disclose the project and the country and to state why the payment information is not disclosed? If so, should we revise Item 1202 to require the same disclosure of the country and reason for non-disclosure?

No, as there is no need for an exception, and such an exception would undermine the provision.

The only exception that could be consistent with the law (and even that is not certain) and the sovereignty of foreign governments would be an official legal document from a foreign government attesting to and demonstrating that the country had a law or regulation explicitly prohibiting payment disclosure prior to the passage of 1504. In the absence of 1504 requiring this and no foreign law requiring it either, there is no need for an exception and would be strange and superfluous to do so.

Question 56

Should the rules provide an exception only if a host country's statutes or administrative code prohibits disclosure of the required payment information?

No. Given the absence of legal evidence that such provisions exist, it would seem strange to include such an exception unless the Commission were inviting countries to provide a loophole to the Commissions' regulations.

Should we provide an exception if a judicial or administrative order or executive decree prohibits disclosing the required payment information as long as the order or decree is in written form?

No, see above. There is no evidence of this type of act by foreign governments. Further, such legal instruments are the most prone to abuse under these circumstances, and an exception encouraging their passage could work to undermine the provision.

Should we limit any exception provided to circumstances in which such a prohibition on disclosure was in place prior to the enactment of the Act?

There should not be an exception because there is no need. The Commission may want to see the actual text of any country's laws or regulations that is said to prohibit payment disclosure. These laws are public, so they should be provided to the Commission.

Question 57

Should the rules provide an exception for existing or future agreements that contain confidentiality provisions? Would an exception be consistent with the statute and the protection of investors?

No. Given the distinct absence of these laws and contract provisions, it would be a mistake to allow existing and future laws to include an exception to the rule. It would only invite evasion of the law and undermine, quite seriously, the utility of the law for investors. Having comparable information is critical. Exceptions would create poor information.

Question 60

Are there any other circumstances in which an exception to the disclosure requirement would be appropriate? For instance, would it be appropriate to provide an exception for commercially or competitively sensitive information, or when disclosure would cause a resource extraction issuer to breach a contractual obligation?

No. The Commission should not invite mass avoidance of its rules by providing a vague and unhelpful "commercially or competitively sensitive information" exception. There is no evidence that complying with securities disclosures will result in breach of contract by listed

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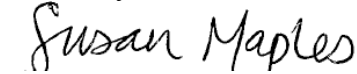
companies; nor are there prohibitions of disclosing payment data in any of the 150 extractive industry surveyed for the *Contracts Confidential* report, nor in the contracts I have reviewed since. There is no need for these exceptions, and creating them would only invite the potential for an unnecessarily broad reading of laws, regulations, and contracts to avoid disclosure. Surely this is not the goal of the Commission or the rule of law generally.

In sum, an exception for compliance with foreign law is unnecessary in this context and would undermine Congressional intent to create a universal disclosure standard for investors to evaluate this particular form of risk exposure.

3) Conclusion

I very much appreciate the opportunity to submit these comments on this incredibly important rule. Should you have any questions, I would be happy to discuss this further.

Sincerely,



Susan

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ANNEX: EXAMPLES OF FOREIGN LAW

São Tomé e Príncipe

Lei No. 8/2004, Oil Finance Law, Art. 17:

1. All payments, management, use and investment of Oil Revenues or Oil Resources shall be subject to the transparency principle.
2. The transparency principle implies disclosure of, and public access to, namely: a) Payments and respective receipts, management, and debit and credit transactions, as well as balances of the Oil Accounts.”

In the definitions section of the law, “Oil Revenue” is defined as “any payment or payment obligation owed by any Person to the State, directly or indirectly, with respect to the oil resources of Sao Tome and Principe, including but not limited to: (I) Any and all payments from the Joint Development Authority arising out of hydrocarbon-related activities developed in, or in connection with, the Joint Development Zone; (II) All payments arising out of activities related to Exclusive Economic Zone Oil Resources, namely, but not limited to Sao Tome and Principe’s share of crude oil and gas sales; signature bonuses and production bonuses; royalties; rents; proceeds from sale of assets; taxes; fees; duties and customs taxes; public service fees; net profits of state-owned companies; revenues from State share rights in oil contracts; crude oil sales; commercial activity resulting from transaction of oil, gas, or refined products; return on investors of the oil revenues; any and all payments generated in connection with the commercial production of hydrocarbons; (III) Other revenues of analogous nature or revenues deemed as having an analogous nature by law.

Fiji

Petroleum Exploration and Exploitation Amendment Act, 1985.¹¹

All maps, plans, reports, records, interpretations and data which the holder of a licence is or may be required to give or supply or to permit inspection under the provisions of this Act shall be given or supplied at the expense of such holder and shall be treated as confidential at all times whilst such licence remains in force:

Provided that the Minister, the Director or any officer of the Government duly authorised by the Minister in that behalf shall be entitled-

- (a) at any time, to make use of any information received from such holder for the purpose of preparing and publishing aggregated returns and general reports on the extent of petroleum exploration and exploitation operations;**
- (b) at any time to make use of topographical survey information including submarine topography, for any purpose whatsoever;**

¹¹ Available at faolex.fao.org/docs/texts/fij50787.doc.

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- (c) at any time, to make use of any information received from such holder for the purpose of any arbitration or litigation in relation to the area the subject of such licence;
- (d) at any time, to make use of information regarding economic minerals other than petroleum;
- (e) to publish summaries of exploration wells, including lithological groups, letter classification boundaries and hydrocarbon zones- (i) in the case of discovery wells, not less than two years after completion of drilling; (ii) in other cases at any time.

Canada

British Columbia, Canada, DRILLING AND PRODUCTION REGULATION (from Petroleum and Natural Gas Act). Release of information. 57

- (1) In this section: "geological and geophysical reports" means geological, geophysical and other reports in the possession of the ministry or the commission that have confidential status because of a designation made by the minister under section 122 (2) of the Act, but does not include well reports and well data; "well reports and well data" means: (a) information obtained from a well, for example, drilling reports, well history reports, unprocessed and processed log data, dipmeter surveys, directional surveys, drill stem test data and analyses, wire line data, pressure-volume- temperature and flow test data and analyses, subsurface pressure data and analyses, completion information, geological information, drilling depths, casing and cementing information, well status, gas, oil or water sample or analysis data, drill cuttings and any analysis and description of the drill cuttings and cores, and (b) proprietary geological information, engineering data and supporting calculations contained in pre-application submissions for well authorizations, but does not include geological and geophysical reports.
- (2) Subject to this section, well reports and well data that are received by the ministry or the commission in the course of the administration of the Act must be held confidential by the ministry and the commission.
- (3) Geological and geophysical reports must be released from confidential status (a) 10 years after the date of receipt by the ministry or the commission, if it receives the information in the performance of a program of work under any of sections 43, 56, 57 or 58 (3) (c) of the Act, or (b) 21 years after the date of receipt by the ministry or the commission, if it receives the information other than as set out in paragraph (a).
- (4) Well reports and well data recorded with or submitted to the ministry or the commission must be released from confidential status (a) 2 calendar months after the date of release of the drilling rig for a well or portion of a well classified as a development well, (b) 6 calendar months after the date of release of the drilling rig for a well or portion of a well classified as an exploratory outpost, (c) one year after the date of release of the drilling rig for a well or portion of a well classified as an exploratory wildcat, (d) one year after the date of release of the drilling or service rig when a well has been reentered and, in the opinion of an authorized commission employee, a new pool has been identified, (e) 3 years after the date of release of the drilling rig for a well or

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a portion of a well forming part of an experimental scheme, or (f) 3 years after the date of release of the drilling rig for a well or a portion of a well that is capable of producing natural gas from strata or a stratum containing mainly coal and that forms part of a development scheme.

(5) The commissioner and deputy commissioner are designated as employees of the commission who, on application of the operator of a well, may order that the requirements of subsection (4), for the release from confidential status of well reports and well data, do not apply to that operator in relation to that well, for the period and subject to the other conditions the commissioner or deputy commissioner may specify, if satisfied that (a) the operator of the well requests that the ministry offer a Crown reserve for disposition by public tender and the ministry has deferred its decision on the request, (b) the well reports and well data include information from which a person might reasonably be expected to infer the existence of petroleum or natural gas in the Crown reserve referred to in paragraph (a), and (c) the release of the well information in accordance with subsection (4) would significantly harm the business interests of the operator of the well.

(6) Well reports and well data must not be released under subsection (4) from confidential status at any time when an application, under section 14 (5), for reclassification of the well as an exploratory wildcat, or, under subsection (5), for an exemption, is under consideration pending a decision.

(7) Despite subsection (4), if information has been released in accordance with subsection (4) and a reclassification or experimental status granted, the information released must not be reclassified as confidential.

(8) The following information is available to the public at all times during business hours: (a) expected total depth at the time of approval of the well authorization, formation at expected total depth, position, ground elevation and drilling status of a well; (b) all applications and submissions made to the minister or the commission for the purpose of a hearing.

(9) Well reports and well data may be released from confidential status (a) if, for any reason, the rights to the well have reverted to the government, or (b) with the concurrence of the person who submitted the information to the ministry or the commission.

(10) If a location is surrendered, any information obtained from a well on that location may be released from confidential status at any time after the surrender.

(11) If a location is or becomes Crown reserve, all geological and geophysical reports and well reports and well data for that location may be released from confidential status.

(12) Despite any restrictions placed on the release of information by this regulation, any information may be released by the Lieutenant Governor in Council at any time when he or she considers it in the public interest to do so.

(13) Repealed. [B.C. Reg. 390/2004, s. 27 (b).]

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(14) If information has been released from confidential status under this Division, any person may attend at the office of the commission and (a) reproduce records of the information on microfilm for a fee set out in the Petroleum and Natural Gas General Regulation, or (b) examine or copy the records, for a fee set out in that regulation.

(15) The fees stipulated in subsection (14) may be waived for individuals conducting research as part of a university program, for employees of the government of Canada or a province of Canada, for employees of a regulatory body, or for the benefit of an educational or scientific society, with the approval of an authorized commission employee.

(16) Despite subsection (4), if, as a result of the reclassification of a well or portion of a well as an exploratory wildcat under section 14 (5), and on approval of an application from the well operator, well reports and well data from each subsequent well in the pool must be held confidential by the ministry and the commission until the confidentiality period for the discovery well has expired or for the period specified under subsection (4), whichever results in the later date.